STATE OF MICHIGAN

COURT OF APPEALS

JAMES GILMORE,

Plaintiff-Appellant,

v

EDWARD G. JANKOWSKI, M.D., EDWARD G. JANKOWSKI, M.D., P.C., M.S. JAFRI, M.D., M.S. JAFRI, M.D., P.C., an assumed name for Eastside Medical Services, P.C., EDGEWOOD CLINIC, an assumed name for Eastside Medical Services, P.C., JAMES M. FOX, M.D., ST. JOHN HOSPITAL & MEDICAL CENTER, and ST. JOHN HEALTH SYSTEM,

Defendants-Appellees.

UNPUBLISHED
June 19, 2003

No. 238949
Wayne Circuit Court
LC No. 00-016590-NH

Before: Griffin, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff James Gilmore appeals as of right from the circuit court's order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants James M. Fox, M.D., St. John Hospital and Medical Center, and St. John Health System (hereinafter referred to jointly as "Fox"), M.S. Jafri, M.D., M.S. Jafri, M.D., P.C., and Edgewood Clinic (hereinafter referred to jointly as "Jafri"), and Edward G. Jankowski, M.D., and Edward G. Jankowski, M.D., P.C. (hereinafter referred to jointly as "Jankowski"). We affirm.

I

Plaintiff filed the present action on May 22, 2000, seeking damages for the loss of his sense of smell. Plaintiff alleged that defendants, three physicians, breached the various standards of practice applicable to each, including the failure to sooner refer plaintiff to an ear, nose, and throat (ENT) specialist (asserted as to defendants Fox and Jafri), and the failure to diagnose the cause of his sinus problems as a tumor (asserted as to defendant Jankowski). Plaintiff claimed that the delay in diagnosis of and surgery to remove the tumor resulted in the loss of his sense of smell.

Plaintiff was first seen for his sinus problems by defendant Fox, an emergency room specialist, on December 31, 1997. Sinus x-rays were taken and a diagnosis of sinusitis was made. Defendant Fox prescribed an antibiotic and referred plaintiff to his family physician for follow-up treatment. There was no referral to an ENT specialist, which plaintiff now claims violated the standard of care for an emergency room physician.

On January 14, 1998, plaintiff was seen for his sinus problems by defendant Jafri, an internal medicine physician. Defendant Jafri did not diagnose the tumor, but ordered additional sinus x-rays. On May 4, 1998, plaintiff was seen by defendant Jankowski, an ENT specialist. At a second visit on June 1, 1998, Jankowski noted the presence of a polyp and recommended surgery to address the problems that plaintiff complained of. According to plaintiff's complaint, it was at this visit that defendant Jankowski first violated the standard of care of an ENT specialist due to his failure to require further testing. The evidence indicates that plaintiff considered surgery but did not assent to the procedure until October 1998. The scheduled November surgery did not proceed as planned, however, because plaintiff's insurance company required a second opinion. Thus, in November 1998 plaintiff saw a second ENT specialist, at which time a CT scan revealed the presence of a nonmalignant tumor, an ameloblstoma. Surgery was finally performed four months later, in March 1999, by a third ENT specialist, at which time the tumor was completely removed.

Plaintiff's emergency medicine expert, Dr. Bucci, testified at his deposition that Dr. Fox properly examined and treated plaintiff at the St. John emergency department on December 31, 1997. Dr. Bucci opined that the only breach of the standard of practice by defendant Fox was the failure to refer plaintiff directly to an ENT specialist, rather than to a primary care physician. Plaintiff's internal medicine expert, Dr. Farber, asserted that the standard of practice applicable to defendant Jafri required that he also refer plaintiff to an ENT specialist.

Plaintiff's ENT expert, Dr. Mihail, who was also plaintiff's only expert to testify regarding causation, testified that defendant Jankowski, the ENT specialist, did not breach the standard of care when he first saw plaintiff on May 4, 1998. Dr. Mihail asserted, however, that by either June or August of 1998, Jankowski should have ordered more diagnostic studies which would have resulted in diagnosis of the tumor. Dr. Mihail opined that because of the history which plaintiff presented on June 1, 1998, the standard of practice required defendant Jankowski to take x-rays and compare them to the earlier x-rays. Had Jankowski done so, Dr. Mihail claimed that the tumor would have been seen in the maxillary sinuses, would have been biopsied, and ultimately diagnosed and surgery performed.

With respect to causation, Dr. Mihail testified that surgery to remove the tumor would have been required no matter when it was diagnosed. He stated, however, that had the tumor been diagnosed sooner, specifically before the tumor had grown beyond the maxillary sinuses, a less invasive type of surgery could have been performed. With the less invasive surgery, Dr. Mihail claimed that plaintiff probably would not have lost his sense of smell. Dr. Mihail conceded, however, that he could not indicate at what point in time the tumor probably had grown beyond the maxillary sinuses such that the more invasive surgery was required. He testified that the x-rays taken when plaintiff saw defendant Fox on December 31, 1997, did not show the tumor having grown beyond the maxillary sinuses, and that no growth of the tumor was evident from x-rays taken when plaintiff saw defendant Jafri on January 14, 1998. Further, Dr.

Mihail specifically conceded that he could not tell how large the tumor was by June 1998, one month after plaintiff was in fact seen by an ENT physician, defendant Jankowski.

Defendants thereafter filed motions for summary disposition, arguing that plaintiff's ENT expert's testimony was insufficient to create a genuine issue of material fact regarding legal and factual causation because he was unable to testify, without relying on impermissible speculation, that the tumor would have been discovered earlier than June 1998, and was similarly unable to offer any non-speculative testimony regarding the progress of the tumor.

In an opinion and order dated November 1, 2001, Judge Susan Beike Neilson granted summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants. In a detailed analysis, the court concluded that plaintiff had failed to establish a prima facie case of medical malpractice because plaintiff could not establish factually either that the requisite standard of practice required diagnosis of the tumor in January 1998, rather than in June 1998, when plaintiff saw an ENT and a polyp was actually diagnosed, or that the delay in diagnosis between January and June 1998 resulted in any injury to plaintiff (i.e., the growth of the tumor during this period required more invasive surgery). Plaintiff now appeals.

II

On appeal, plaintiff contends that the trial court erred in granting summary disposition to defendants because plaintiff did provide sufficient evidence that defendant Jankowski violated the standard of care for an ENT specialist. Plaintiff further argues that the trial court erred in determining that no cause in fact existed to support plaintiff's claims.

A motion for summary disposition pursuant to MCR 2.116(C)(10), which tests the factual support for a claim, is reviewed de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In deciding a motion for summary disposition under MCR 2.116(C)(10), the court considers affidavits, pleadings, depositions, admissions, and all other documentary evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). If the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); *Karbel v Comerica Bank*, 247 Mich App 90, 95-97; 635 NW2d 69 (2001).

In an action alleging medical malpractice, a plaintiff is required to prove (1) the applicable standard of care, (2) breach of that standard by the defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 10; 651 NW2d 356 (2002); *Weymers v Khera*, 454 Mich 639, 655; 563 NW2d 647 (1997); *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995). The statutory requirements regarding the burden of proof in a medical malpractice case are set forth in MCL 600.2912a, which provides in pertinent part:

> (1) Subject to subsection (2), in an action alleging malpractice, the plaintiff has the burden of proving that in light of the state of the art existing at the time of the alleged malpractice:

* * *

> (b) The defendant, if a specialist, failed to provide the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances and as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.
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> (2) . . . In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. . . .

Proximate cause itself requires proof of two separate elements: (1) cause in fact, and (2) legal or proximate cause. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). To establish cause in fact, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's alleged injury would not have occurred. *Weymers, supra* at 647-648; *Skinner, supra* at 164-165. In the context of a medical malpractice action, this Court in *Badalamenti v Beaumont Hosp*, 237 Mich App 278, 285-286; 602 NW2d 854 (1999) explained:

> In *Skinner v Square D Co*, 445 Mich 153, 162-170; 516 NW2d 475 (1994), a products liability case, our Supreme Court clarified what is required to establish cause in fact. Referencing Prosser & Keeton, Torts (5th ed), § 41, p 266, the Court stated that "[t]he cause in fact element generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Skinner, supra* at 163. Our Supreme Court explained that "[t]o be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation," *id*. at 164, and reaffirmed that "the plaintiff must present *substantial evidence* from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Id.* at 164-165 (emphasis added). Our Supreme Court noted that it has consistently applied this threshold evidentiary standard of factual causation in negligence cases:
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> "The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." [*Id*. at 165; citations omitted.]
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> Accord *Weymers*, *supra* at 647-648 (a medical malpractice case). The Supreme Court in *Skinner* also concurred with the observation made in 57A Am Jur 2d, Negligence, § 461, p 442, that negligence is not established if the evidence lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses. *Skinner, supra* at 166. [Emphasis in original.]

See also *Karbel, supra* at 97-98.

Expert testimony is usually required to establish the existence of causation in a medical malpractice action because the scientific knowledge necessary to determine whether an injury is truly attributable to something a physician or other medical professional did or failed to do is generally not within the common understanding of a reasonable jury. *Locke v Pachtman*, 446 Mich 216, 222, 231-233; 521 NW2d 786 (1994).

Here, we agree with and hereby adopt that portion of the circuit court's well-reasoned opinion concluding that there exists no genuine issue of material fact regarding the issue of proximate causation:

> Plaintiff argues that Mihail's testimony establishes that a reasonably prudent ENT would have made the diagnosis of tumor in January, and thus establishes that Fox's and Jafri's failure to refer to an ENT was the proximate cause of plaintiff's damages – however, *plaintiff does not dispute that Mihail did in fact testify that the standard of practice did not require that diagnosis to be made until June of 1998, when the ENT did in fact ultimately see a polyp.*
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> The issue, the court believes, is best framed as follows: where the standard of practice would not *require* an ENT to make a diagnosis in January (that is, failure to diagnose would not be a violation of the standard of practice) is Mihail's opinion that it is "very possible" that an ENT would diagnose (that is, would go beyond the standard of practice by ordering a CAT scan and making a diagnosis in January) sufficient to demonstrate that Fox's or Jafri's breach was, more probably than not, the proximate cause of plaintiff's damages? The court finds in the negative. The court agrees with defendants that it is simply impossible to know to a reasonable degree of certainty what this unknown ENT would or would not have done – that is, it is impossible to do other than speculate as to whether this ENT would have done other than meet the minimum standard of care. Plaintiff appears to argue that a jury could make a "reasonable inference" that an ENT would have made a diagnosis in January . . . but this appears to be based on nothing more than the (no doubt valid) assumption of Dr. Mihail that many doctors do, in fact, go beyond the minimum standard of care. However, without any knowledge of who this ENT might have been, Dr. Mihail's opinion is based upon speculation and is insufficient to support his opinion concerning causation. *Id.* Absent his opinion, plaintiff has no testimony to support the claim that any breach of the standard of care by defendants was the proximate cause of plaintiff's damages, and summary disposition is required. [Emphasis in original and emphasis added.]

Based on our review of the record, we agree with the trial court's assessment of the evidence and her conclusion that summary disposition was warranted under the circumstances. As reasoned by the trial court, even hypothetically assuming that plaintiff had been referred to a different ENT specialist in January than he saw in May, it cannot reasonably be surmised that an earlier diagnosis would have been made unless the standard of practice required that diagnosis. Plaintiff has failed to establish that a referral by defendants Fox and Jafri to an ENT specialist in December 1997 and January 1998 probably would have resulted in an earlier diagnosis, in light of Dr. Mihail's concession that the ENT standard of practice did not require diagnosis until June 1998, after plaintiff did in fact see an ENT, defendant Jankowski. Although Dr. Mihail

speculated during his deposition that "it's very possible" that a different ENT specialist would have been "more aggressive" in conducting tests in January than was defendant Jankowski in May, his testimony indicated that a diagnosis would not have been required by the standard of practice before June 1998. Thus, plaintiff's assertion that a diagnosis and surgery could or would have occurred in January 1998, had plaintiff seen an ENT specialist then, was based on pure speculation. *Badalamenti, supra*.

Plaintiff's reliance on Dr. Mihail's affidavit of merit, executed before his deposition testimony, as evidence creating a genuine issue of material fact, is without merit. A prior affidavit of merit cannot serve to create an issue of fact negated by subsequent deposition testimony of that same expert. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 479-482; 633 NW2d 440 (2001).

Moreover, we agree with and adopt the analysis of the circuit court that summary disposition is warranted because plaintiff has failed to establish that the alleged failure to diagnose and delay in referral to an ENT specialist by defendants resulted in injury to plaintiff. In this regard, the circuit court, extensively and accurately citing pertinent testimony, reasoned as follows:

> It is Fox and Jafri's position that there is no evidence from which Dr. Mihail can give any opinions, to a reasonable degree of medical certainty, concerning the rate at which the tumor grew between January of 1998 and May of 1998. Therefore, argue Fox and Jafri, since the damage to plaintiff is the more extensive surgery required by the tumor growth *between January and May* it is impossible to do other than speculate as to whether the alleged failure to diagnose *by Fox and Jafri* resulted in any damage to plaintiff. Similarly, argues Jankowski, there is no evidence from which Dr. Mihail can give any opinions, to a reasonable degree of medical certainty, concerning the rate at which the tumor grew between June of 1998 and November of 1998. Jankowski argues that since the damage to plaintiff allegedly caused by Jankowski is the more extensive surgery required by the tumor growth *between June and November*, it is impossible to do other than speculate as to whether the alleged failure to diagnose by Jankowski resulted in any damage to plaintiff.
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> The court agrees with plaintiff that Dr. Mihail's testimony is sufficient (for purposes of this motion) to establish that the tumor did not grow significantly between 12/31/97 and 1/14/98. However, the court agrees with Fox and Jafri that there is no factual or scientific basis for Dr. Mihail's assertion that different, less invasive surgery would have been required in January than that which would have been performed, according to plaintiff, when plaintiff did in fact see Jankowski (the ENT) in May. In other words, if the tumor did not grow significantly between January and May, the delay between the time the plaintiff should have been referred to an ENT, and the time he actually was referred to an ENT, is irrelevant.

> Despite Dr. Mihail's comment (noted above) that there is "very good reason to believe" that the tumor had grown between January and June, he could cite to no scientific or physical evidence to support that opinion, other than that a polyp existed in June which was not present in May.
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> . . . Given Dr. Mihail's testimony that there are no scientific studies regarding the rate of growth of this tumor, and that he had no knowledge even whether this type of tumor was slow-growing or fast-growing, any opinion offered by him concerning the nature of the growth of the tumor between January of 1998 and May of 1998 can be based on nothing more than unreliable speculation, which is clearly insufficient to support his opinion . . . . In the absence of his opinion, plaintiff cannot establish that any breach by Fox and Jafri was the proximate cause of plaintiff's damages, and summary disposition is therefore required.
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> Similarly, as to Jankowski, the issue is not whether or not the tumor grew at all between June and November of 1998, but whether it grew such that plaintiff was damaged, that is, that the nature of the surgery plaintiff needed changed as a result of tumor growth. Again, given Dr. Mihail's testimony that there are no scientific studies regarding the rate of growth of this tumor, and that he had no knowledge even whether this type of tumor was slow-growing or fast-growing, any opinion offered by him concerning the nature of the growth of the tumor between June of 1998 and November of 1998 lacks factual foundation. . . . In the absence of his opinion, plaintiff cannot establish that any breach by Jankowski was the proximate cause of plaintiff's damages, and summary disposition is therefore required. [Emphasis in original.]

Dr. Mihail's opinion that the alleged negligence caused plaintiff's damages is based on pure speculation. As noted above, speculation is insufficient to legally support plaintiff's theory of cause in fact. *Skinner, supra; Badalamenti, supra*. Without this testimony, plaintiff is unable to establish, by a preponderance of the evidence, that the alleged negligence of defendants was the cause in fact of plaintiff's damages. Because plaintiff has failed to present a prima facie case of medical malpractice, we conclude that summary disposition pursuant to MCR 2.116(C)(10) as granted by the circuit court was proper.

Affirmed.

/s/ Richard Allen Griffin
/s/ William B. Murphy
/s/ Kathleen Jansen